FEDERAL CIRCUIT COURT OF AUSTRALIA

SZSWB v MINISTER FOR IMMIGRATION & ANOR *[2014] FCCA 765*

Catchwords:
MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in Iran substantially because of incidents arising in the course of his cigarette selling business – whether the Tribunal erred in its consideration of the applicant's claim to complementary protection considered.

Legislation:
Migration Act 1958 (Cth), ss.5AA, 36, 499
Migration Amendment (Unauthorised Maritime Arrivals) Regulations 2013 (Cth)

Cases cited:
Applicant WAEE v Minister for Immigration (2004) 75 ALD 630
Baker v Minister for Immigration [2012] FCAFC 145
Chan v Minister for Immigration (1989) 169 CLR 379
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531
Minister for Immigration v Anochie [2012] FCA 144
Minister for Immigration, Re; Ex parte Applicant S20/2002 (2003) 198 ALR 59; [2003] HCA 30
Minister for Immigration v SZQRB (2013) 210 FCR 505
Minister for Immigration v SZRKT (2013) 212 FCR 99
Minister for Immigration v SZSCA [2013] FCAFC 155
NABD of 2002 v Minister for Immigration (2005) 79 ALJR 1142
NABE v Minister for Immigration (No 2) (2004) 144 CLR 1
Nweke v Minister for Immigration [2013] FCAFC 79
SZHBP v Minister for Immigration (2007) 97 ALD 84; [2007] FCA 1226
SZRZN v Minister for Immigration & Anor [2013] FCCA 510
SZSSM v Minister for Immigration & Anor [2013] FCCA 1489
SZSZO v Minister for Immigration & Anor [2014] FCCA 242
Tewao v Minister for Immigration (2012) 128 ALD 185; [2012] FCAFC 39

Applicant:	SZSWB
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File Number:	SYG 1088 of 2013
Judgment of:	Judge Driver
Hearing date:	17 December 2013
Delivered at:	Sydney
Delivered on:	5 May 2014

REPRESENTATION

Counsel for the Applicant:	Ms S Patterson
Solicitors for the Applicant:	Fragomen
Counsel for the Respondents:	Mr G Johnson SC with Mr P Knowles
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari shall issue removing the record of the Refugee Review Tribunal decision made on 19 April 2013 into this Court for the purpose of quashing it.

(2) A writ of mandamus shall issue, requiring the Refugee Review Tribunal to redetermine the review application before it according to law.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 1088 of 2013

SZSWB
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal (Tribunal). The decision was made on 19 April 2013. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from Iran and had claimed persecution because of several incidents, some allegedly involving his being targeted by a rival cigarette seller and another because of a speech that he had made at a mosque. The applicant's advisor also claimed that the applicant would be targeted on the basis that he had sought asylum in the West.

2. The applicant is an "unauthorised maritime arrival" (UMA) within the meaning of the definition of that term in s.5AA of the *Migration Act 1958* (Cth) (Migration Act) for the purposes of the *Migration Amendment (Unauthorised Maritime Arrivals) Regulations 2013* (Cth) (UMA Regulations). At the trial of this matter on 17 December 2013 I drew the attention of counsel to the then very recently made UMA

Regulations and invited post hearing submissions on whether the granting of relief to the applicant would be futile because of the application of those Regulations to him. I later became aware of a challenge to the UMA Regulations in the High Court and, following further correspondence with the parties, I stood the whole matter over pending the decision of the High Court in *Plaintiff S297/2013 v Minister for Immigration*. The issue has since become moot because of the disallowance of the UMA Regulations in the Senate on 27 March 2014. I listed the matter for further directions on 10 April 2014 but vacated that directions hearing at the request of the parties on 8 April 2014. This was on the basis of a consensus that there was no longer any impediment to the Court dealing with the case on its legal merits.

3. The following statement of background facts is derived from the submissions of the parties.

4. The applicant is a citizen of Iran. He arrived in Australia on or about 17 May 2012.[1] The applicant applied for a protection (Class XA) visa on 1 August 2012.[2] A delegate of the Minister made a decision refusing to grant that visa on 19 October 2012.[3] The applicant then applied to the Tribunal, on 19 November 2012, for review of the delegate's decision.[4]

5. Before this Court, the applicant relies on three alternative grounds, as set out in the application. Each of those grounds relate to a claim made by the applicant to be entitled to "complementary protection" (pursuant to s.36(2)(aa) of the Migration Act), in respect of incidents arising in the course of the applicant's conduct of a cigarette distribution and selling business (cigarette business complementary protection claim). The details of the cigarette business complementary protection claim are set out further at [8]-[14] below.

6. Before the Tribunal, the applicant also relied on a number of other factual matters, concerning an incident which occurred at a mosque, and also concerning, broadly speaking, the situation of failed asylum seekers returning to Iran. In respect of those factual matters the

[1] See Relevant Documents (RD) at 1 (date of entry interview).
[2] RD at 21-106.
[3] RD at 117-139.
[4] RD at 141-146.

applicant's claims were based on both Australia's obligations under the Refugees Convention (s.36(2)(a) of the Migration Act), and on Australia's complementary protection obligations (s.36(2)(aa) of the Migration Act). Subject to what is set out below, none of the grounds of the present application relate to those factual matters, and I do not need to deal with those matters.

7. The only matters relevant to the current proceedings relate to the applicant's claim to fear harm arising from his involvement in the sale of cigarettes. Also, the Minister does not concede that the applicant ever made any claim to the Tribunal that he would, despite any past harm or threat that he had suffered, again resume selling cigarettes in the event that he returned to Iran.

The applicant's cigarette business complementary protection claim

8. The details of the applicant's claims concerning his cigarette business were as follows.

9. The applicant lived in Tehran. In about 2008, he began operating a retail business, in which he sold non-electrical kitchenware and air fresheners. He imported kitchenware from China, and commenced manufacture of home air fresheners in a local factory. The applicant's business was very successful.[5] In the early months of 2010, the applicant commenced distribution of cigarettes as part of his business. This business was done with a man named Khaleghi. The applicant was quickly very successful in the business of importing and distributing cigarettes.[6]

10. In around September 2010, the applicant was approached by a man named Ali, who the applicant knew worked in a competitor's cigarette distribution business. The applicant suspected that the distribution network for whom Ali worked was controlled by the Vezarat-e Sepah Pasdaran-e-Enqelab-e Islamic ("Sepah" or Islamic Revolutionary Guards). Ali told the applicant to "pull out of this business – or we are going to hang you". The applicant continued in his cigarette business.

[5] RD at 158 (applicant's submissions to the Tribunal, 19 March 2013).
[6] RD at 158 (applicant's submissions to the Tribunal, 19 March 2013).

After this, the applicant received telephone calls from Ali, telling the applicant to get out of the business or he would get hurt.[7]

11. Shortly after these telephone calls, in late September 2010, the applicant was on the street looking for a taxi, when a car (a utility) came speeding towards him. The applicant was struck by the car, knocked unconscious, and his legs were severely injured. His leg injuries required lengthy surgery, and took around 12 months to recover. About a week after being hit by the car, the applicant received a telephone call from Ali, who referred to not having seen the applicant for some time. Because the applicant perceived Ali to have been behind the incident, the applicant replied: "Thank you very much, this was your doing."[8]

12. Around the end of 2011, when the applicant had recovered from his injuries, his family moved to a new residence. At around this time, the applicant made contact with Khaleghi, with a view to recommencing his cigarette business.[9]

13. At the hearing before the Tribunal, the applicant confirmed that although he regained contact with Khaleghi with a view to recommencing distribution of cigarettes, he did not in fact recommence his cigarette business. He explained that this was because he received further threats to stay away from the cigarette business, and so he left Iran.[10]

14. The applicant's submissions to the Tribunal raised the issue of whether the applicant is entitled to complementary protection.[11] In those submissions, the applicant referred in particular to the harm he had suffered at the hands of Ali and the Sepah in connection with his cigarette business as indicating that he faced a real risk of significant harm if he returned to Iran.[12]

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[7] RD at 158-159 (applicant's submissions to the Tribunal, 19 March 2013).
[8] RD at 159 (applicant's submissions to the Tribunal, 19 March 2013).
[9] RD at 160 (applicant's submissions to the Tribunal, 19 March 2013).
[10] See affidavit of Jenny Falconer affirmed 1 July 2013, Annexure A (transcript of Tribunal hearing), at 13, 14. The evidence is also recounted in the Attachment B (Claims and Evidence) to the Tribunal's reasons at [47]: RD at 235.
[11] RD at 162 (applicant's submissions to the Tribunal, 19 March 2013).
[12] RD at 169-173, especially at 172-3 (applicant's submissions to the Tribunal, 19 March 2013).

The Tribunal's decision

15. The structure of the Tribunal's reasons[13] was as follows. The Tribunal outlined the factual matters raised by the applicant, and made findings about them. Those factual matters and findings were under the headings, "Targeting by a rival cigarette seller",[14] "Incident at Mosque",[15] "Claim that the applicant does not practice the Islamic religion"[16] and "Failed asylum seekers".[17]

16. In respect of the cigarette business, the Tribunal stated:[18]

> *The applicant has stated that he was run over in 2010 and Ali, a rival cigarette seller was to blame. He also claims that the distribution network which Ali worked in was controlled by Sepah. The Tribunal has found the applicant's story difficult to follow, that is at hearing he initially stated that before he left Iran he was selling kitchen appliances, accessories, cigarettes and air fresheners however he subsequently changed his evidence and said that he did not sell cigarettes after he was warned off. Whilst the Tribunal accepts that there may have been a distribution dispute, the applicant failed to explain at hearing how that related to his refugee claims. In addition, his consistent evidence was that he moved from* [location A] *to a different unit in* [location B] *and continued to be in business without incident after being run over in 2010. Even if the Tribunal accepts that the applicant has been involved in some sort territorial dispute involving the sale of cigarettes which lead to his being run over in 2010, and even if the Tribunal accepts the rival network was controlled by Sepah, the Tribunal is not satisfied that the applicant described at hearing anything more than a nonrelated convention turf war. Neither did the applicant suggest that anything had happened to him since 2010. Given this and given the applicant's concluding statements at hearing which were that he was not selling cigarettes when he departed Iran, the Tribunal is not satisfied that there is a real chance that the applicant will suffer harm because of any past dispute on his return.*

17. Having set out the factual matters raised by the applicant, and its findings in relation to them, the Tribunal then set out[19] its conclusions

[13] RD at 206-209.
[14] at [7].
[15] at [8]-[10].
[16] at [11]-[12].
[17] at [13]-[15].
[18] RD at 206 at [7].

as to whether it was satisfied that the applicant was a refugee.[20] The Tribunal stated that it was not satisfied that the applicant "faces a real chance of persecution for a Convention reason" on return to Iran, and that he is therefore not a person to whom Australia owes protection obligations within the meaning of s.36(2)(a) of the Migration Act.

18. The Tribunal then noted[21] that the applicant's agent had submitted that there are substantial grounds for believing that there is a real risk that the applicant will suffer significant harm.[22]

19. The Tribunal then said:[23]

> *As noted above, the Tribunal is not satisfied that the applicant engaged in the alleged behaviour at the mosque or that he has been imputed with any anti regime political opinion. The Tribunal is not satisfied that the applicant has suffered any harm since 2010 and has not suffered convention based harm. It is not satisfied that the applicant has engaged in any anti-religious or any political activities in the past. It is not satisfied that he has been imputed with any antigovernment opinion either in Iran or at any time after he departed. Given this, the Tribunal is not satisfied he will be imputed with an anti-government political opinion merely for leaving Iran, or for seeking asylum in a Western country or for being in or returning from or even forcibly returning from a Western country. Whilst he may be questioned on return and may even be monitored, this treatment does not amount to significant harm. The Tribunal is not satisfied on the evidence that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Iran there is a real risk that the applicant will be arbitrarily deprived of his life, the death penalty will be carried out, he will be subjected to torture or cruel or inhuman treatment or punishment or degrading treatment or punishment for a combination of being a failed asylum seeker or because he has left Iran, or been in, or returned from or even forcibly returned from a Western country to Iran.*

20. Although the Tribunal did not expressly refer to s.36(2)(aa) of the Migration Act, the terms used by the Tribunal at [18]-[19] indicated

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[19] at [16]-[17].
[20] RD at 208.
[21] at [18].
[22] RD at 208.
[23] RD at 208-209 at [19].

that it was in those paragraphs that the Tribunal addressed whether the applicant was entitled to complementary protection.

The judicial review application

21. The applicant relies upon his show cause application filed on 20 May 2013. That application contains three particularised grounds:

> *1. The Tribunal failed to consider a relevant consideration and/or constructively failed to exercise its jurisdiction in that it failed to consider a claim made by the applicant, namely, that, as a result of incidents relating to his cigarette selling business, he faced a real risk of significant harm within the meaning of s.36(2)(aa) of the Act.*
>
> *Particulars*
>
> *a. One of the claims made by the applicant was that he is person in respect of whom Australia has protection obligations referred to in s.36(2)(aa) of the Act, arising out of significant harm he had suffered at the hands of a man named "Ali" and his associates, in relation to the applicant's cigarette selling business (the "cigarette business CP claim").*
>
> *b. In relation to the harm the applicant had suffered at the hands of Ali and his associates in connection with the applicant's cigarette selling business, the Tribunal only considered whether the applicant was a person in respect of whom Australia has protection obligations referred to in s.36(2)(a) of the Act.*
>
> *2. In the alternative to Ground 1, if the Tribunal did consider (which is not conceded), the applicant's cigarette business CP claim, the Tribunal asked itself the wrong question and/or misunderstood the nature of its task and/or took into account an irrelevant consideration when it considered the applicant's cigarette business CP claim.*
>
> *Particulars*
>
> *a. In making findings about the harm that the applicant had suffered at the hands of Ali and his associates, the Tribunal:*
>
> *i. referred to an absence of a connection to the applicant's "refugee claims"; and*

ii. *indicated that it considered that the incidents concerning the applicant's cigarette selling business were "*a nonrelated convention turf war*".*

b. *In making findings in respect of claims made by the applicant in relation to s.36(2)(aa) of the Act, the Tribunal referred to the fact that it was not satisfied that the applicant had suffered "*convention based harm*".*

c. *The Tribunal's determination of the applicant's cigarette business CP claim was based on the matters referred to in paragraphs (i) and (ii) above.*

d. *In considering the matters referred to in paragraphs (i) and (ii) above when determining the applicant's cigarette business CP claim, the Tribunal thereby asked itself the wrong question and/or misunderstood the nature of its task and/or took into account an irrelevant consideration.*

3. *In the alternative to Grounds 1 and 2, if the Tribunal did consider the applicant's cigarette business CP claim independently of its consideration of whether the applicant had suffered "Convention-based harm" (which is not conceded), the Tribunal failed to apply the correct legal test and/or failed to consider a relevant consideration, in that when assessing whether there is a real risk that the applicant will suffer significant harm, the Tribunal failed to consider whether the applicant's modified conduct was influenced by the threat of harm.*

Particulars

a. *If (which is not conceded) the Tribunal's determination of the applicant's cigarette business CP claim was independent of the Tribunal's references to an absence of Convention-related harm, then the reasons given for the Tribunal's rejection of the cigarette business CP claim were that the applicant had not suffered any harm since the incident in 2010 and he had not sold cigarettes after that time.*

b. *In rejecting the applicant's cigarette business CP claim for these reasons, the Tribunal failed to consider whether the applicant had modified his conduct (by ceasing to sell*

cigarettes after the incident in 2010) as a consequence of the harm he had suffered.

c. The Tribunal therefore determined the question of whether the applicant faced a real risk of significant harm without determining whether the applicant's modified conduct (in not selling cigarettes) after the incident in 2010 was influenced by the threat of significant harm.

22. I have before me as evidence the book of relevant documents filed on 25 June 2013 as well as the affidavit of Jenny Falconer made on 1 July 2013, to which is annexed a transcript of the hearing conducted by the Tribunal on 20 March 2013.

23. The parties made oral and written submissions.

Consideration

Ground 1 – Did the Tribunal fail to consider the applicant's cigarette business complementary protection claim?

24. As set out at [8]-[14] above, the applicant's submissions to and evidence before the Tribunal raised a claim that the applicant was entitled to protection pursuant to s.36(2)(aa) (as well as s.36(2)(a)) as a result of the incidents relating to his cigarette business.

25. For the reasons set out below, although the Tribunal's reasons are not entirely clear, there is sufficient to indicate that the Tribunal did consider the applicant's cigarette business complementary protection claim.

26. I accept some of the applicant's submissions concerning this ground. The Tribunal's consideration of the applicant's entitlement to complementary protection pursuant to s.36(2)(aa) of the Migration Act is at [19] of the Tribunal's reasons (and set out [19] above). In that paragraph, the Tribunal mentions a number of other factual matters raised by the applicant as bases for his entitlement to a protection visa, such as an incident at a mosque, anti-religious and political activities, and his status as a failed asylum seeker and returnee from the West. However, the Tribunal did not mention the incidents relating to his cigarette business in the course of its analysis at [19].

27. The Tribunal's discussion of the incidents concerning the applicant's cigarette business at [7] of the Tribunal's reasons (set out at [16] above) does not amount to express consideration of the applicant's cigarette business complementary protection claim. This is because in that paragraph, the Tribunal referred to an absence of explanation as to how the incidents concerning his cigarette business "related to his refugee claims", and the Tribunal's characterisation of the incidents as "a nonrelated Convention turf war". Therefore, it is clear that in this paragraph the Tribunal was principally considering the incident concerning the applicant's cigarette business in relation to a claim pursuant to s.36(2)(a) of the Migration Act, rather than the applicant's additional claim pursuant to s.36(2)(aa) of the Migration Act. This is confirmed by the structure of the Tribunal's reasons. As explained at [15]-[20] above, Tribunal's approach was first to consider the applicant's factual claims and his claim therefore to be entitled to protection under the Refugees Convention[24] at [7]-[17], before then addressing the question of complementary protection[25] at [18]-[19].

28. However, it does not follow that the Tribunal did not give consideration to the applicant's cigarette business complementary protection claim. I accept in that regard the Minister's submissions.

29. The cigarette trading claims were expressly considered in several other parts of the Tribunal's reasons, in addition to [7].[26] Given these express references to the cigarette trading claim, and given the otherwise comprehensive nature of the Tribunal's decision, the Court should not infer that the Tribunal failed to consider that claim in so far as it related to s.36(2)(aa).[27]

30. In any event, in light of its factual findings, at [7] and subject to consideration of Grounds 2 and 3, the Tribunal was not required to consider the applicant's claim to complementary protection by reason of his alleged involvement cigarette trading. It was a fundamental factual premise of any complementary protection claim that the applicant would be exposed to a risk of harm as a result of his past

[24] Migration Act, s.36(2)(a).
[25] Migration Act, s.36(2)(aa).
[26] e.g. RD 206 at [9], RD 216 quoting excerpts from the applicant's initial statement, RD 220-221 and 233 quoting the submissions of the applicant's advisor, and RD 234-235 at [46]-[47] summarising the applicant's evidence at the hearing before the Tribunal.
[27] *Applicant WAEE v Minister for Immigration* (2004) 75 ALD 630 at [47] *per curiam*.

involvement in cigarette trading and the dispute thus generated. The Tribunal did not accept this factual premise. Although parts of what the Tribunal said at [7] are expressed in terms of consideration of whether the Tribunal is satisfied of the refugee criterion in s.36(2)(a), other parts of [7] are not so limited. In particular, the Tribunal found that there was not a "real chance"[28] that the applicant would suffer (any) harm as a result of "any past dispute" as to his involvement in the cigarette trade for two reasons: the applicant "did not suggest anything had happened to him since 2010" and "the Applicant's concluding statements at hearing which were that he was not selling cigarettes when he departed Iran".

31. The Minister emphasises, and I accept, that this finding was not confined to a risk of "serious harm"; it was a more general finding that there was no real chance of the applicant suffering any harm by reason of his past involvement in cigarette trading.

32. Having rejected the fundamental premise that the applicant was at risk of harm due to his past involvement in the cigarette trade, in relation to this ground it was not necessary for the Tribunal to go on to consider whether that involvement satisfied the complementary protection criterion in s.36(2)(aa). The claim was already answered by being "subsumed in findings of greater generality", or, alternatively, it rested upon a "factual premise" which had already "been rejected". [29]

33. That is the principal answer to the first ground. In addition, however, two further submissions are made by the Minister which I accept .

34. First, whereas the applicant places some significance upon the "structure" of the Tribunal's reasoning, portraying [7] as entirely concerned with the refugee claims, and [19] as being the sole and separate consideration of the complementary protection claims, such structural considerations should not prevail in the manner urged by the applicant.

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[28] As the applicant's submissions note, the "real chance" test applicable under s.36(2)(a) is a comparable threshold to the "real risk" test applicable under s.36(2)(aa): see *Minister for Immigration v SZQRB* (2013) 210 FCR 505 at [234]-[246] per Lander and Gordon JJ (with whom Besanko and Jagot JJ agreed at [297] and with whom Flick J also agreed at [342]). As a result, the finding that there was no real chance of harm arising from the applicant's cigarette trading for the purposes of s.36(2)(a) applies with equal force to the findings made in relation to s.36(2)(aa).

[29] *Applicant WAEE v Minister for Immigration* (2004) 75 ALD 630 at [47] *per curiam.*

35. In *Tewao v Minister for Immigration*[30], a Full Court of the Federal Court of Australia (Cowdroy, Reeves and Jagot JJ) held that:

> *…In terms of principle, it is well recognized by courts that a statement of reasons, of necessity, must deal with relevant issues in a particular order. The necessities of written expression should not be confused with the task of substantive consideration…..the assumption that in making the ultimate decision the minister's substantive consideration proceeded in a strict sequence, each step being a wholly self-contained exercise, is unrealistic.*

36. That was based upon a statement by Gleeson CJ in *Minister for Immigration, Re; Ex parte Applicant S20/2002*[31], where his Honour said:

> *Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole.*

37. That same statement by Gleeson CJ was cited by another Full Court (Nicholas, Yates and Griffiths JJ) in *Baker v Minister for Immigration*[32], where their Honours said of those remarks:

> *Although that passage dealt directly with sequential reasons in relation to evidence given by different witnesses, we consider that its underlying principle, which recognises the need to read a decision-makers reasons as a whole, applies equally to a case such as here, where the Tribunal's reasons deal sequentially with different issues for consideration.*

38. Similarly, in *Nweke v Minister for Immigration*[33] at [23]-[24], a further Full Court (Allsop CJ, Flick and Robertson JJ) refer both to *Applicant S20/2002* at [14] and Baker at [43] and found "it follows that the reasons must be read as a whole".

39. Secondly, the applicant never made any claim that he would (despite past harm and any other threat of harm) again resume selling cigarettes

[30] (2012) 128 ALD 185; [2012] FCAFC 39 at [24]-[27].
[31] (2003) 198 ALR 59; [2003] HCA 30 at [14].
[32] [2012] FCAFC 145 at [43]-[44].
[33] [2013] FCAFC 79.

in Iran in the event that he returned to that country. Rather, his evidence supported the proposition that he would be too afraid to do so. In *NABE v Minister for Immigration (No 2)*[34], Black CJ, French and Selway JJ acknowledged that a claim may arise on the material before the Tribunal, as opposed to being expressly made, but, at [68], their Honours found that "a judgment that the Tribunal has failed to consider a claim not expressly advanced is… not lightly to be made" and "the claim must emerge clearly from the materials before the Tribunal".

40. I reject Ground 1.

Ground 2 – Did the Tribunal ask itself the wrong question?

41. Ground 2 alleges that the Tribunal wrongly imported the Convention reason requirement applicable to refugee claims into the test applicable to complementary protection claims. It is apparent from the applicant's written submissions, especially at [28], that this ground attacks [7] of the Tribunal's reasons.

42. In determining whether the applicant was entitled to a protection visa by reference to the criterion set out in s.36(2)(aa), the Tribunal's task was to assess whether there were substantial grounds for believing that there is a "real risk" that the applicant will suffer "significant harm" (as defined in s.36(2A) and clarified in s.36(2B)). Unlike s.36(2)(a), which concerns protection obligations under the Refugees Convention, there is no requirement in s.36(2)(aa) that the real risk of significant harm be related to any of the reasons for persecution (namely, race, religion, nationality, membership of a particular social group or political opinion) set out in Article 1A(2) of the Refugees Convention.

43. However, in [7] of its reasons, which is where the Tribunal analysed the applicant's account of the incidents concerning his cigarette business, the Tribunal twice referred to those incidents being unrelated to Refugees Convention criteria. These references were as follows (with emphasis added):

    a) "Whilst the Tribunal accepts that there may have been a distribution dispute, the applicant failed to explain at hearing how that related to his refugee claims."

[34] (2004) 144 CLR 1.

b) "…the Tribunal is not satisfied that the applicant described at hearing anything more than a **nonrelated convention** turf war."

44. Therefore, the applicant contends that if the Tribunal's reasons at [7] can be understood as consideration of the applicant's cigarette business complementary protection claim, it is clear that the Tribunal assessed that claim by reference to whether the claim was related to persecution for a reason specified in the Refugees Convention.

45. In reasoning in this way, the Tribunal is said to have erred, because "it is an error for the Tribunal to conflate the tests of persecution and complementary protection".[35] In this case, the Tribunal's error is said to have been to consider whether the real risk of significant harm was related to a Refugees Convention reason, when the statutory criterion does not require any such relationship. That error can be characterised either as asking the wrong question, misunderstanding the nature of the task, or taking into account an irrelevant consideration.

46. I agree with the Minister that that approach is met by the arguments regarding [7] and [19] of the Tribunal's reasons as are advanced above under the heading of Ground 1. The findings at [7] cannot be divorced from the findings at [19].

47. The concluding sentences of [19] accurately summarise the test applicable under s.36(2)(aa) using language which closely reflects the statutory text. The Tribunal also summarised the law applicable to complementary protection accurately in Attachment A to its reasons.[36] There is no basis to attribute to the Tribunal an erroneous understanding of the relevant law in circumstances where it identified and applied the correct test at [19].

48. It is true that [19], which ultimately addresses complementary protection, does initially contain some language referring back to the Tribunal's dissatisfaction that the applicant had suffered "Convention based harm", or imputations of various kinds, but the Tribunal is there doing no more than calling to mind findings previously made, when dealing with issues arising under s.36(2)(a), before reaching the operative part of [19] contained in the second last sentence

[35] see my decision in *SZSSM v Minister for Immigration & Anor* [2013] FCCA 1489 at [98].
[36] RD 213-214 at [34]-[36].

commencing on RD 208 and continuing until the conclusion of that paragraph. This, read in context with the remainder of the Tribunal's reasons, does not demonstrate any conflation of the tests applicable to refugee claims and complementary protection claims. The facts which were said to give rise to the refugee claims were the same facts said to give rise to the claims for complementary protection. It is understandable and unexceptionable, therefore, that the Tribunal incidentally referred back to the alleged Convention bases of the applicant's complementary protection claims when summarising those claims at [19]. This simply reflects the manner in which the claims were presented.

49. I reject Ground 2.

Ground 3 – Did the Tribunal apply the wrong test?

50. Ground 3 is based on the proposition, which I have adopted, that the Tribunal's reasons can be understood as including a finding, independent of its conclusions as to an absence of a Refugees Convention nexus, that the applicant did not face a real risk of significant harm arising out of the cigarette business incidents. The other basis for that finding, which is mentioned in the Tribunal's reasons, is that the main incident (the car "accident") occurred in 2010 and the applicant was not in the cigarette business when he left Iran in 2012.[37]

51. As set out at [8]-[14] above, the applicant's claim in relation his cigarette business was that after he became successful in the business, he received threats from a man named Ali to withdraw from the cigarette business, which he did not do. In September 2010, the applicant was the victim of a car accident which he perceived to have been orchestrated by Ali, and his injuries were so severe that lengthy surgery was required and he took 12 months to recover. Then, at the end of 2011, the applicant made contact with Khaleghi with a view to recommencing his cigarette business. However, he did not in fact recommence that business, because he received further threats to stay away from the cigarette business, and so he left Iran.

[37] see [7] and [19] of the Tribunal's reasons.

52. It is understandable that, based upon the applicant's claims, the reason for the applicant not being involved in the cigarette business after the car accident in September 2010 until he left Iran in March 2012[38] was the harm he had suffered in relation to that business. From September 2010 until late 2011, the applicant was not involved in the business because he was recovering from his injuries. From late 2011 until March 2012, the effect of the applicant's evidence was that when he was taking steps to recommence the business he received further threats, and so he did not recommence the business but instead left Iran. Therefore, the applicant's claims and evidence indicated that he had modified his conduct (in not being involved in the cigarette business after September 2010), and this was caused by the harm that he had suffered. In short, he had been scared out of the business.

53. The applicant argues by analogy from authority concerning refugee claims that the approach of the Tribunal to this issue involved error. In relation to claims for protection pursuant to s.36(2)(a) of the Migration Act, it is clear that where a person has modified their conduct (such as living discreetly as a homosexual, or ceasing political activities after suffering harm because of them), "to determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly".[39]

54. The reasoning in *Appellant S395* concerned the proper application of the "real chance" test.[40] Although the criteria for a protection visa under s.36(2)(a) and s.36(2)(aa) contain different elements (as noted at [42]-[45] above), what is common to both criteria is the requirement for the Tribunal to assess whether the applicant faced a "real chance"[41] of persecution or harm. In *Minister for Immigration v SZQRB*[42], the Full Court held that the standard (or threshold) required in respect of

[38] RD at 161 (applicant's submissions to the Tribunal, 19 March 2013).
[39] *Appellant S395 v Minister for Immigration* (2003) 216 CLR 473 (*Appellant S395*) at [43] per McHugh and Kirby JJ; see also *SZHBP v Minister for Immigration* (2007) 97 ALD 84; [2007] FCA 1226 (*SZHBP*) at [31], [35] per Rares J.
[40] see at [43] (per McHugh and Kirby JJ).
[41] Section 36(2)(a) and *Chan v Minister for Immigration* (1989) 169 CLR 379 or "real risk" (s.36(2)(aa)).
[42] (2013) 210 FCR 505.

"real risk" pursuant to s.36(2)(aa) is the same as the "real chance" test in s.36(2)(a).[43]

55. Given this similarity between the "real chance" and "real risk" tests, the applicant submits that the reasoning in *Appellant S395* concerning the proper determination of the "real chance" test, when considering a situation where a visa applicant has modified the conduct which attracted (or risks attracting) harm, is also applicable to s.36(2)(aa).

56. Here, the Tribunal referred to the car accident having occurred in 2010[44], to the applicant not being in the cigarette business when he left Iran[45] (in March 2012[46]), and to the applicant not having suffered any harm since 2010.[47] Particularly in light of the applicant's evidence that he received threats when considering recommencing his cigarette business in late 2011 and that he then left Iran, the evidence before the Tribunal strongly indicated that the applicant's modification of his conduct (in ceasing to be in the cigarette business) was influenced by the threat of harm he faced. In these circumstances, the applicant contends that it was an error for the Tribunal to rely on the applicant's non-involvement in the cigarette business in the period before he left Iran (and the consequent lack of harm he suffered during that period) as a basis for concluding that the applicant did not face a real risk of significant harm, without first determining whether that non-involvement was influenced by the threat of harm he faced.[48]

57. The Minister denies that there was any error in the Tribunal's approach. The applicant did not expressly state his intention to recommence his cigarette trading business if returned to Iran. Nor, so the Minister submits, did that claim clearly emerge from the material before the Tribunal. However, the applicant did claim that he received threats when he attempted to re-enter the cigarette market after 2010.[49] It is this evidence that forms the basis for the applicant's submission in this Court that the applicant modified his conduct by refraining from

[43] at [243]-[246] per Lander and Gordon JJ (with whom Besanko and Jagot JJ at [297] and Flick J at [342] agreed).
[44] RD at 206 at [7].
[45] RD at 206 at [7].
[46] The date when the Applicant left Iran – March 2012 – was stated in the applicant's submissions to the Tribunal at RD at 161.
[47] RD at 206, 208 at [7] and [19].
[48] *Appellant S395* at [43]; *SZHBP* at [3], [31], [42] (per Rares J).
[49] RD 235 at [47].

trading in cigarettes. He contends that the effect of this ground is then that the Tribunal should have considered whether this modified conduct was influenced by the threat of harm.

58. The Minister submits that the principles articulated in *Appellant S395*[50] are not applicable in respect of complementary protection claims under s.36(2)(aa). It is common ground that the Convention reason requirement forms no part of the criteria in s.36(2)(aa).

59. The starting point in the analysis of this question must be the text of s.36(2)(aa) of the Migration Act which provides:

> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *...*
>
> *(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or*
>
> *...*

60. Section 36(2)(aa) addresses the risk of significant harm that is a "necessary and foreseeable consequence of" the removal of a person from Australia to a receiving country. In this aspect, the statutory language reflects the fact that s.36(2)(aa) implements certain of Australia's international obligations of *non-refoulement* (i.e. obligations relating to the circumstances in which a person can be removed to another country). Where, as in this case, the risk of harm contended for by the applicant could only arise if the applicant voluntarily chose to resume cigarette trading once returned to the receiving country, this risk is said by the Minister not to be a necessary consequence of the removal of the person to the receiving country. Because any risk of harm from again selling cigarettes could only arise

[50] and subsequent cases including *NABD of 2002 v Minister for Immigration* (2005) 79 ALJR 1142 and *SZHBP*.

if and when that choice was made by the applicant, the Minister contends that it cannot be a "necessary" consequence of the applicant's mere removal from Australia. The applicant may choose, as he has in the past, on his own evidence, not to again sell cigarettes because of past harm or threats.

61. This submission as to the meaning of "necessary and foreseeable consequence" is said to be consistent with the decision of Perram J in *Minister for Immigration v Anochie*[51] (a case considering a direction under s.499 of the Migration Act)[52]. His Honour stated, at [62], in relation to the words "necessary and foreseeable consequence":

> *One should observe the high standard set by this test. A foreseeable consequence is one thing, but a 'necessary and foreseeable consequence' is another altogether. It is foreseeable that I may get wet on the way home today, but on no view is it both necessary and foreseeable that this should occur – the clouds may clear.*

62. Importantly, *Appellant S395* is only concerned with the Refugees Convention and not the complementary protection criteria which were not in existence at the time of that decision. The applicant's submissions argue by analogy from the passages that he relies upon from *Appellant S395* without grappling with the different language of s.36(2)(aa).

63. The Minister notes that an extension of the time allowed to provide submissions had been sought and allowed by me to enable the parties to consider the judgment of the Full Court of the Federal Court of Australia in *Minister for Immigration v SZSCA*[53]. It had been anticipated that this judgment might say something about the complementary protection criteria in s.36(2)(aa) of the Migration Act, including the component of "necessary and foreseeable consequence". In fact, the appeal was decided without the Court needing to say

[51] [2012] FCA 144.
[52] The construction of the term "necessary and foreseeable consequence" in s.36(2)(aa) is also the subject of a decision currently reserved before this Court – see *SZSKC v Minister for Immigration* (SYG2982/2012) heard before Judge Lloyd-Jones on 31 May 2013. That case did not involve an allegation that the Tribunal imposed a requirement upon the applicant to modify his behavior.
[53] [2013] FCAFC 155 (Flick, Robertson and Griffiths JJ).

anything about the complementary protection criteria.[54] The judgment is accordingly not one which bears directly upon the present case.[55]

64. Nevertheless, as I said in *SZSZO v Minister for Immigration & Anor*[56], the Tribunal cannot determine a claim of complementary protection in a manner contrary to the principles set out by the majority in that case if those principles are relevant. In my view, they are relevant. At the heart of the decisions in *Appellant S395* and *SZSCA* is the proposition that protection visa applicants should not be required to deny or conceal a Convention attribute in order to find safety in their country of origin when that Convention attribute is the basis upon which they seek protection in Australia.

65. The Convention in issue in those cases was the Refugees Convention. There is, however, no logical reason why the same principle should not apply to the Conventions which support the complementary protection provisions of the Migration Act – in particular, the International Covenant on Civil and Political Rights (ICCPR). A protection visa applicant cannot claim complementary protection in respect of conduct consistent with the ICCPR.[57] Conversely, it would be an error for the Tribunal to expect a protection visa applicant to forego a right conferred by the ICCPR in order to find safety in his or her country of origin, especially if it was the exercise of that right which gave rise to the harm feared by the applicant.

66. There was no consideration by the Tribunal of the question of whether the applicant in this case would be giving up a right conferred by the ICCPR by avoiding his trade or profession of choice if he returned to Iran. In terms of s.36(2)(aa) the issue was whether the significant harm feared by the applicant would be the necessary and foreseeable consequence of his removal from Australia if he sought to exercise his Convention rights in Iran. The harm feared cannot be consistent with a relevant Convention if the only way of avoiding the harm is to accept a violation of a Convention right. There needed to be consideration of that issue because it was clear that the applicant claimed that he did not

[54] see per Robertson and Griffiths JJ at [92]-[95].
[55] Formally and protectively, the Minister submits that the majority judgment was incorrect and that the dissenting opinion of Flick J was without error.
[56] [2014] FCCA 242.
[57] see [67] below.

abandon cigarette selling by his free choice. He was scared out of the trade by the physical harm he suffered and the subsequent threat of further harm.

67. In my view, this approach is consistent with the statutory definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s.5 of the Migration Act which excludes acts "not inconsistent" with articles, in particular Article 7, of the ICCPR.

68. As noted earlier, the Tribunal's error was a failure to determine whether the applicant's modified conduct was influenced by the threat of harm he faced, which was inconsistent with the ICCPR, before finding that the applicant did not face a real risk of significant harm. That error can be characterised as failing to apply the correct legal test or failing to consider a relevant consideration,[58] or as a constructive failure to exercise jurisdiction.[59] The applicant is therefore entitled to the relief sought in the application.

69. I will hear the parties as to costs.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 5 May 2014

[58] as in *SZHBP* at [35].
[59] as indicated in *Appellant S395* at [54] per McHugh and Kirby JJ.